

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 649 Patient Brokering  
**SPONSOR(S):** Children, Families & Seniors Subcommittee  
**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Children, Families & Seniors Subcommittee		Siples	Brazzell

### SUMMARY ANALYSIS

Florida's patient brokering statute makes it unlawful for a person to receive or provide a commission, benefit, bonus, rebate, kickback, or bribe, for the referral of a patient to or from a substance abuse provider or health care facility. The law provides a number of exceptions to the prohibition, including to any discount, waiver of payment or payment arrangement expressly authorized under the federal anti-kickback statute, which prohibits inducements for patient referrals for services payable by a federal health care program. Although the federal anti-kickback statute provides exceptions to its provisions, there may be payment arrangements that are not prohibited under the federal law but also not expressly authorized.

PCS for HB 649 revises the Florida patient-brokering statute to exempt discount, waivers of payment, or payment that are not prohibited by the federal anti-kickback statute, rather than those that are expressly authorized. The bill also makes such exception applicable to any payment scheme, regardless of whether it involves services paid, in whole or in part, by a federal health care program.

The bill has no fiscal effect on local or state governments.

The bill provides an effective date of July 1, 2020.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation

##### Patient Brokering

In Florida, it is unlawful for any person, including a health care provider or health care facility, to engage in patient brokering.<sup>1</sup> Patient brokering is paying to induce, or make a payment in return for, a referral of a patient to or from a health care provider or health care facility. Such payments include commissions, benefits, bonuses, rebates, kickbacks, bribes, split-fee arrangements, in cash or in kind, provided directly or indirectly.<sup>2</sup> A person who violates the patient brokering statute commits a felony of the third degree.<sup>3</sup> If the violation involves 10 to 19 patients, the person commits a felony of the second degree.<sup>4</sup> If the violation involves more than 20 patients, the person commits a felony of the first degree.<sup>5</sup>

There are a number of exceptions to the prohibition on patient brokering, including:<sup>6</sup>

- Any discount, payment, waiver of payment, or payment expressly authorized by the Federal Anti-Kickback Statute or regulations adopted thereunder;
- Any payment, compensation or financial arrangements within a group practice, provided such payment, compensation, or arrangement is not to or from persons who are not members of the group practice;
- Payments to a health care provider or health care facility for professional consultation services;
- Commissions, fees, or other remuneration lawfully paid to insurance agents;
- Payments by a health insurer who reimburses, provides, offers to provide, or administers health, mental health, or substance abuse goods or services under a health benefit plan;
- Payments to or by a health care provider or health care facility that has contracted with a health insurer, health care purchasing group, or the Medicare or Medicaid program to provide health, mental health, or substance abuse goods or services under a health benefit;
- Lawfully authorized insurance advertising gifts;
- Commissions or fees paid to a nurse registry for referring persons providing health care services to clients of the nurse registry;
- Certain payments by health care providers or health care facilities to a health, mental health, or substance abuse information service that provides information upon request and without charge to consumers about provider of health care good or services to enable consumers to select appropriate providers of facilities; and
- Certain payments authorized for assisted living facilities

Until 2019, the patient brokering statute did not apply to any discount, payment, waiver of payment, or payment practice that was not prohibited by the federal anti-kickback statute. In 2019, the Legislature enacted legislation that applied this exception to only those payment schemes expressly authorized under federal law.<sup>7</sup> This change created uncertainty for those using payment practices that were not prohibited under federal law but also not expressly authorized.

##### Federal Anti-Kickback Statute

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<sup>1</sup> Section 817.505, F.S.

<sup>2</sup> Section 817.505(1), F.S.

<sup>3</sup> Punishable by a term of imprisonment not to exceed 5 years and a fine of \$50,000.

<sup>4</sup> Punishable by a term of imprisonment not to exceed 15 years and a fine of \$100,000.

<sup>5</sup> Punishable by a term of imprisonment not to exceed 30 years and a fine of \$500,000.

<sup>6</sup> Section 817.505(3), F.S.

<sup>7</sup> Chapter 2019-59, L.O.F.

Federal law prohibits payment for the referral of an individual to a person for furnishing or arranging to furnish any item or service for which payment may be made under a federal health care program.<sup>8</sup> Violation of the federal anti-kickback statute is a felony that is punishable by a fine of up to \$25,000 or up to 5 years in prison, or both.<sup>9</sup> However, there are several exceptions to the federal statute, including, but not limited to:<sup>10</sup>

- Discounts properly disclosed and appropriately reflected in the costs claimed and charges made by the provider or entity;
- Payments between employers and employees for employment in the provision of covered items or services;
- Certain payments to a group purchasing organization;
- Waivers of co-insurance;
- Certain risk-sharing agreements; and
- The waiver of any cost-sharing provisions by a pharmacy.

Payment arrangements that do not squarely meet one of the exceptions are reviewed on a case-by-case basis to determine if the parties have the requisite criminal intent.<sup>11</sup> The Office of the Inspector General, within the U.S. Department of Health and Human Services, is proposing additional exceptions to the anti-kickback statute, including payment arrangements that are currently used by health care practitioners but are not specifically authorized under the statute.<sup>12</sup>

### Effect of Proposed Changes

Currently, the patient brokering statute does not apply to any discount, payment, waiver of payment, or payment practice that is expressly authorized by the federal anti-kickback statute. PCS for HB 649 amends this provision so that the patient brokering statute does not apply to any such payment scheme not prohibited by the federal anti-kickback statute.

The bill also makes such exception applicable to any payment scheme, regardless of whether it involves services paid in whole or in part by a federal health care program<sup>13</sup> designated in the federal anti-kickback law on July 1, 2020, such as Medicare and Medicaid.

The bill provides an effective date of July 1, 2020.

## B. SECTION DIRECTORY:

**Section 1:** Amends s. 817.505, F.S., relating to patient brokering prohibited; exceptions; penalties.

**Section2:** Provides an effective date of July 1, 2020.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

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<sup>8</sup> 42 U.S.C. s. 1320a-7b(b).

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> U.S. Department of Health and Human Services, *HHS Office of Inspector General Fact Sheet: Notice of Proposed Rulemaking OIG-0936-AA10-P*, (Oct. 2019), available at [https://oig.hhs.gov/authorities/docs/2019/CoordinatedCare\\_FactSheet\\_October2019.pdf](https://oig.hhs.gov/authorities/docs/2019/CoordinatedCare_FactSheet_October2019.pdf) (last visited January 14, 2020).

<sup>12</sup> Id.

<sup>13</sup> 42 U.S.C. §1320a-7b(f) defines “federal health care program” as any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States government or any state health care program. State health care programs include Medicaid, maternal and child health services block grants, block grants and programs for social services and elder justice, and state children’s health insurance programs.

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may alleviate confusion on which payment schemes are permissible under the state patient brokering law.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES